U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 16 2010
SRC 09 083 52373

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

This petition, filed on January 21, 2009, seeks to classify the petitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The documentation submitted by the petitioner reflects that she worked at "the Queens Hospital Center as a Dietician from November 1, 2004 to October 21, 2008." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel argues that the petitioner's "expertise has a national impact and that it warrants exemption from the Labor Certification Process."

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.--
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(i), states:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> > (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner asserts that she is an alien of exceptional ability. This issue is moot, however, because the director found that the petitioner qualifies as a member of the professions holding an advanced degree.[1] The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the

[1] The record reflects that the petitioner received a Bachelor of Science degree in "Foods and Nutrition" from the College of the Holy Spirit in the Philippines (1981) and that she has at least five years of progressive post-baccalaureate experience in her specialty in the United States. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

With regard to the first factor set forth in *NYSDOT*, we find that the petitioner works in an area of intrinsic merit, nutrition.

Regarding the second factor in *NYSDOT*, whether the proposed benefit of the petitioner's work will be national in scope, counsel states: "As a Dietician, [the petitioner] is actively engaged in the improvement of healthcare in the U.S. particularly in obesity, diabetes, heart diseases & hypertension through giving appropriate Nutrition interventions to patients who are mostly indigent, under the Medicaid and Medicare program." Part 6, "Basic information about the proposed employment," of the Immigrant Petition for Alien Worker, Form I-140, was left blank. Moreover, a January 12, 2009 employment verification letter from the Queens Health Network indicates that the petitioner's employment as a dietician with Queens Hospital Center in New York terminated on October 21, 2008. The documentation initially submitted does not specify where the petitioner will be working as a dietician and how the benefits of her work with patients there will be national in scope.

Even if the petitioner had submitted more specific information about her proposed employment in the United States, *id.* at 217, n.3 provides examples of employment where the benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

As a dietician working with patients in the Medicaid and Medicare programs, the petitioner has not established the benefits to the United States which she will impart would be national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Along with her educational qualifications, two letters verifying the dates of her past job experience, various training certifications, two recognition certificates, and articles about obesity and diabetes, the petitioner submitted two letters of recommendation.

[redacted], states:

> I had worked with [the petitioner] since 2004-2008. She had worked as an Inpatient & Outpatient Dietitian. During this period, she was able to handle different floors such as Medical/Surgical, Mother & Baby, Labor & Delivery, Pediatrics, Psychiatry & Detox, Cancer Center & Rehabilitation Units which I think showed her flexibility, willingness to work on any given assignments & competency in knowledge of Medical Nutrition Therapy. She was also able to establish good rapport with her co-workers & patients with different ethnic backgrounds which is an important skill to acquire in any given workplace.
>
> As a Dietitian, her performance & skills will be an asset & of great help to facilitate a positive contribution in the prevention, care & improvement of health in United States.

does not provide specific examples of how the petitioner's work as a dietician has influenced the field as a whole. With regard to the petitioner's skills and experience as a dietician, objective qualifications and experience necessary for the performance of a particular occupation can be articulated in an application for alien employment certification. Pursuant to *NYSDOT*, 22 I&N Dec. at 221, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of experience or skills that could be articulated on an application for employment certification.

[redacted], states:

> It is my pleasure to recommend [the petitioner], whom I have known for 4 years, to work as Dietitian. She had worked in various capacities as a clinician covering some of the specialty units of the facilities such as the Cancer Center, Mother & Baby, Labor & Delivery, Psych & Detox, Pediatrics, Med/Surg and Rehab units.
>
> [The petitioner] is organized, extremely competent and wonderful rapport with a very diverse type of patients which include the minorities such as Blacks, Hispanics, & Asian. She also has a good verbal and written communication skills, which is one the important assets in nutrition assessment.
>
> [The petitioner's] performance is highly valuable and recommendable. Her extensive knowledge and skills in medical nutrition therapy will positively contribute to the improvement of health in the United States.

states that the petitioner has "extensive knowledge and skills in medical nutrition therapy," but she does not provide specific examples of how the petitioner's work has influenced the field as a whole. It cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *NYSDOT*, 22 I&N Dec. at 221.

The petitioner submitted a July 16, 2008 certificate reflecting that she received an Excellence Award "[i]n recognition of valuable contributions of excellence to the Dietary Department." The petitioner also submitted a September 19, 2007 Certificate of Appreciation "in recognition of valuable contributions to the Dietary Department." These certificates reflect institutional recognition rather than recognition throughout her field. The petitioner's initial submission also included two letters verifying the dates of her past job experience. The departmental recognition certificates and letters from former employers verifying the dates of the petitioner's job experience relate to the regulatory criteria for classification as an alien of exceptional ability, a classification that normally requires an approved employment certification. 8 C.F.R. § 204.5(k)(3)(ii). We cannot conclude that meeting one, two, or even the requisite three criteria for classification as an alien of exceptional ability warrants a waiver of the labor certification requirement in the national interest. By statute, "exceptional ability" is not, by itself sufficient cause for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Thus, the *benefit* which the alien presents to her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id.; see also id.* at 222.

On March 24, 2009, the director issued a Notice of Intent to Deny informing the petitioner that her initial evidence did not establish that the proposed benefits of her work would be national in scope and that she would serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The notice was sent to counsel at her current address and advised that a failure to respond may result in the petition being denied. The director received no response. Accordingly, on May 14, 2009, the director denied the petition stating that the petitioner

had not established that a waiver of the required job offer and approved employment certification would be in the national interest of the United States. The director's decision noted a lack of evidence showing that the petitioner's work has had a significant on her field as a whole. We affirm the director's findings.

On appeal, counsel states:

> [W]e request that the USCIS [U.S. Citizenship and Immigration Services] take a second hard look on [the petitioner's] qualifications and experience especially her vital participation in the WE COACH program which provides responsive intervention for seniors with uncontrolled diabetes. The studies and research on diabetes by the WE COACH has a national impact in that it is one sickness that has afflicted millions of Americans, from juvenile to seniors.

As discussed, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218.

The petitioner's appellate submission includes a June 4, 2009 letter from [redacted] New York, stating:

> I am writing at the request of my constituent [the petitioner] who resides in my district . . . .
>
> * * *
>
> According to [the petitioner], she has been a vital part of the "WeCOACH" New York City. This program provides responsive intervention for seniors with uncontrolled diabetes. WeCOACH targets adults primarily 65 years of age or older who have difficulty controlling their diabetes. The program provides exercise activ[ities], healthy diets, and weekly coaching programs for seniors struggling over this 6 week program.
>
> As a coach in this program, [the petitioner] is specifically assigned to her participants based on her healthcare background and ability to match her patient's needs. I am convinced that the WeCOACH program will not be as successful without the effective services of [the petitioner].

The documentation initially submitted by the petitioner did not include any information about the WE COACH program or the petitioner's involvement in that particular program as of the petition's filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). Where, as here, a petitioner has been put on notice of deficiencies in the evidence and has been given an opportunity to respond to those deficiencies, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the evidence pertaining to her involvement in the WE COACH program to be

considered, she should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence that should have been submitted in response to Notice of Intent to Deny but is only now submitted on appeal. Nevertheless, there is no evidence indicating that the benefit of the petitioner's services as dietician or nutritionist with the WE COACH program will extend beyond New York. While diabetes can be considered a national healthcare problem, it has not been demonstrated that the proposed benefits of the petitioner's work as a dietician or nutritionist would be national in scope. Rather, the petitioner's individual impact working with seniors in New York would be so attenuated at the national level as to be negligible.

In evaluating the reference letters, we note that the letters discussing the petitioner's work experience, skills, and training are less persuasive than letters that provide specific examples of how the petitioner has influenced her field as a whole. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from individuals selected by the petitioner is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). In this case, the content of the letters of support submitted by the petitioner does not establish that her work at the time of filing had already had a significant national impact or otherwise influenced her field as a whole.

While petitioner has earned the admiration of her colleagues, she has not established that her past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. We note that the petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.